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AXON SOLUTIONS, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

AXON SOLUTIONS, INC., a Delaware
corporation,

Plaintiff,

v.

SAN DIEGO DATA PROCESSING
CORPORATION, a California publicly
owned corporation; and the CITY OF SAN
DIEGO, a chartered political subdivision of
the State of California,

Defendants.

CITY OF SAN DIEGO, a charter political
subdivision of the State of California,

Counterclaimant,

v.

AXON SOLUTIONS, INC., a Delaware
corporation,

Counterdefendant.

CASE NO. 09 CV 2543 JM BGS
The Honorable Jeffrey T. Miller

**PLAINTIFF AXON SOLUTIONS, INC.'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF ITS
MOTION TO DISMISS
COUNTERCLAIMANT SAN DIEGO
DATA PROCESSING CORPORATION'S
SECOND AMENDED COUNTERCLAIM
FOR BREACH OF CONTRACT [FRCP
12(b)(6)]**

Date: January 28, 2011

Time: 1:30 p.m.

Judge: The Hon. Jeffrey T. Miller

Courtroom: 16, 5th Floor

Complaint filed: November 12, 2009

1 Plaintiff and Counterdefendant AXON SOLUTIONS, INC. (“Axon”) respectfully submits
2 the following Memorandum of Points and Authorities in Support of its Motion to Dismiss
3 Defendant and Counterclaimant SAN DIEGO DATA PROCESSING CORPORATION’S
4 (“SDDPC”) Second Amended Counterclaim for Breach Contract (“SAC”) (Doc. No. 73) pursuant
5 to Federal Rules of Civil Procedure 12(b)(6).

6 On October 21, 2010, the City filed its Compulsory Counterclaim For Breach of Third
7 Party Beneficiary Contract (“CC”) (Doc. No. 71.). As the Court noted in its Order Granting
8 Defendant City of San Diego’s Motion for Leave to File Counterclaim and Amended Answer, the
9 City’s counterclaim for breach of contract is virtually identical to that already filed by SDDPC.
10 (See Doc. No. 51.).” (Doc. No. 69 at 4:7-9.) On November 22, 2010, Axon filed its Motion to
11 Dismiss the City’s CC. (Doc. No. 75). Since the SDDPC’s and the City’s counterclaims are
12 virtually identical, this Motion is also virtually identical. In an effort to avoid redundancy, the
13 hearings on both are scheduled for the same day.

14 **I.** 15 **INTRODUCTION**

16 SDDPC’s SAC fails because it does not allege that SDDPC complied with the MSA’s
17 dispute resolution provision prior to terminating the MSA for cause as required by Section 2.3.
18 Instead, SDDPC’s SAC alleges that after the MSA was terminated, the parties engaged in
19 settlement discussions concerning Axon’s attempt to recover monies owed to it by the City and
20 SDDPC for unpaid deliverables. This is consistent with Axon’s allegations in its First Amended
21 Complaint that after Axon was terminated for convenience, the parties engaged in settlement
22 discussions concerning the amounts owed to Axon for work done up to the effective termination
23 date. (Doc. No. 20 (“FAC”), ¶¶30-41.) The parties never engaged in any dispute resolution
24 efforts with respect to a dispute over whether Axon’s alleged breach of the MSA caused \$6
25 million in remediation damages. This simply did not occur. Therefore, SDDPC’s SAC fails as a
26 matter of law.

II. BACKGROUND

On October 19, 2010, the Court granted Axon's Motion to Dismiss Defendant San Diego Data Processing Corporation's First Amended Counterclaim ("FACC"), and summarized the relevant facts applicable to this Motion. (Doc. No. 68 at 2:3-4:1.) In dismissing SDDPC's FACC, the Court again held that the MSA could be terminated for either convenience under Section 2.2, or for cause under Section 2.3, and that SDDPC's breach of contract claim was barred as a matter of law if SDDPC elected to terminate the MSA for convenience:

Section 2.2 and 2.3 differ in their required procedures for termination. In addition, while Section 2.3 explicitly reserves the rights of the parties to "any other remedies available at law, or under this Agreement," Section 2.2 makes no such qualification. Thus, as this court previously found, when the two sections are read alongside one another, it appears that termination of the MSA under Section 2.2 causes the terminating party to forfeit its right to pursue other remedies, including damages for breach of contract. (Doc. No. 48 pp. 4-5; see also CAL. CIVIL CODE § 1641 ("The whole of the contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.")) Therefore, whether or not SDDPC has adequately stated a claim for relief depends upon whether it has pled facts sufficient to show that it terminated the MSA for cause. (Doc. No. 68 at 5:20-6:3.)

Axon moved to dismiss SDDPC's FACC on a number of different grounds, attempting to show that it had not alleged basic facts that are consistent with a termination for cause because whatever concerns SDDPC (or the City) had about Axon's work, the truth is that SDDPC and the City ultimately elected to terminate the MSA for convenience pursuant to Section 2.2. After construing the allegations in the light most favorable to SDDPC, and accepting those allegations as true, the Court again granted Axon's Motion to Dismiss:

[A]lthough SDDPC has pled facts sufficient to meet the other requirements for termination for cause, its failure to allege compliance with the MSA's dispute resolution requirement means the FACC does not show compliance with all elements of Section 2.3. This is a prerequisite in order for SDDPC to state a claim for breach contract. Therefore, the court GRANTS Axon's motion to dismiss with leave to amend to permit SDDPC to address this deficiency." *Id.* at 13:6-10.

1 Therefore, the Court has already addressed the sufficiency of SDDPC's SAC with respect
2 to the other requirements for a termination for cause. The remaining issue is whether SDDPC's
3 SAC (and the City's CC) allege facts that show SDDPC complied with the dispute resolution
4 provisions of the MSA as required to terminate the MSA for cause pursuant to Section 2.3.

5 In opposition to Axon's Motion to Dismiss its FACC, SDDPC argued it sufficiently
6 alleged compliance with the dispute resolution by alleging "[SDDPC] and its representatives
7 attempted to resolve the City and [SDDPC's] concerns regarding Axon's deficient performance in
8 accordance with the dispute resolution provisions in Section 21." (Doc No. 62, p.5 (quoting
9 FACC ¶23).)" (Doc No. 68: 12:26-13:1.). The Court held "this claim is little more than a
10 conclusory statement, devoid of any factual basis. This is insufficient to demonstrate compliance
11 with Section 21." *Id.* at 13:3-5.

12 In its SAC, SDDPC added allegations related to communications between SDDPC and
13 Axon after the MSA was terminated in attempt to show compliance with the dispute resolution
14 requirement of Section 2.3. However, each of these allegations occur after the MSA was
15 terminated and relate to Axon's claim for unpaid deliverables, not SDDPC or the City's claim for
16 \$6,000,000.00 in remediation damages allegedly "required to correct Axon's errors and faulty
17 performance", (SAC ¶ 29.)

18 **III.** 19 **LEGAL STANDARD**

20 **A. Motion to Dismiss Pursuant to Rule 12(b)(6)**

21 A court should dismiss an action where a complaint fails to "state a claim upon which
22 relief can be granted." Fed. R. Civ. P. 12(b)(6). Therefore, a motion to dismiss should be granted
23 where the complaint lacks either a "cognizable legal theory" or facts sufficient to support a
24 cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). In
25 evaluating the claim a court must "accept as true all of the allegations contained in [the]
26 complaint." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

27 However, the complaint's "factual allegations must be enough to raise a right to relief
28 above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Further, the

1 court need not “accept any unreasonable inferences or assume the truth of legal conclusions cast
 2 in the form of factual allegations.” *Ileto v. Glock Inc.*, (9th Cir. 2003) 349 F.3d 1191, 1200. The
 3 court need not accept as true, allegations that contradict facts which may be judicially noticed
 4 such as matters of public record including pleadings, orders, and other papers filed with the court
 5 or records of administrative bodies. See *Mullis v. United States Bankruptcy Ct.* (9th Cir. 1987)
 6 828 F.2d 1385, 1388; *Mack v. South Bay Beer Distributors* (9th Cir. 1986) 798 F.2d 1279, 1282.

7 IV.

8 **SDDPC’S COUNTERCLAIM FOR BREACH OF CONTRACT FAILS AS A MATTER** 9 **OF LAW PURSUANT TO RULE 12(B)(6)**

10 **A. SDDPC Does Not Allege Compliance With The Dispute Resolution Procedures**

11 SDDPC (and the City) add several new allegations in an attempt to show they complied
 12 with the dispute resolution provisions of the MSA as required to terminate the MSA for cause
 13 pursuant to Section 2.3. (See SAC, ¶¶ 30-40.) Rather than allege that SDDPC met with Axon
 14 prior to terminating the MSA to resolve a dispute concerning Axon’s alleged breach of the MSA,
 15 SDDPC alleges that after Axon was terminated and replaced by SAP (SAC, ¶¶ 27-29), SDDPC
 16 met with Axon to resolve a dispute related to Axon’s unpaid deliverables.

17 These allegations confirm any dispute resolution efforts occurred after the MSA was
 18 terminated and relate to Axon’s claim that it is still owed additional payments for work performed
 19 pursuant to the MSA. SDDPC’s allegations are consistent with Axon’s FAC that after Axon was
 20 terminated for convenience, the parties engaged in settlement discussions concerning the amounts
 21 owed to Axon for work done up to the effective termination date. (Doc. No. 20 (“FAC”), ¶¶30-
 22 41.)

23 While SDDPC alleges it did not want to pay Axon the amounts owed because the “monies
 24 paid to date to Axon represented the value received from the work Axon actually performed in
 25 light of Axon’s deficient performance”, SDDPC and the City are not simply disputing the
 26 amounts owed to Axon. Rather, they are both claiming that Axon breached the MSA, causing \$6
 27 million dollars in remediation damages. SDDPC does not allege that prior to terminating Axon
 28 for cause, the parties engaged in any dispute resolution efforts concerning SDDPC’s claim to \$6

1 million dollars in remediation damages caused by Axon's alleged breach of the MSA as required
2 to terminate the MSA for cause pursuant to Section 2.3:

3 2.3 Subject to the Dispute Resolution provision in Section 21
4 and in addition to other provisions in this Agreement allowing a
5 party to terminate this Agreement in whole or in part, and without
6 limiting any other remedies available at law, or under this
7 Agreement, if any party materially or repeatedly defaults in the
8 performance of any of its duties or obligations under this
9 Agreement, and: (1) within thirty (30) calendar days after written
10 notice of the default; or, (2) with respect to those defaults that
11 cannot be reasonably cured within thirty (30) calendar days, then
12 the Party not in default may terminate this Agreement by giving
13 written notice of the termination to the defaulting Party, which
14 termination shall be effective immediately upon receipt of the
15 notice of termination. If the default is incapable of being cured,
16 then the thirty (30) calendar day cure period shall not apply, and
17 notice of termination may be given directly by the party not in
18 default. (*Id.*, Exh. 1 at pg. 4.)

12 The Court has already held that in order to comply with the all the requirements for a
13 termination for cause under Section 2.3 of the MSA, that SDDPC attempted to resolve the
14 dispute in accordance with the dispute resolution provision of the MSA, which requires:

15 Section 21 of the MSA requires all "disputes aris[ing] from or in
16 connection with" the contract to be determined according to a
17 multi-stage process. The parties must initially attempt to resolve
18 the dispute internally; this starts out with an "escalation process,"
19 wherein the issue is referred up through two different levels of
20 management from each side. If the dispute is still unresolved, it
21 then enters a "final resolution period" in which it is sent to the
22 President of Axon and the President and CEO of SDDPC. Any
23 remaining issues may then be subjected to an alternative resolution
24 procedure such as mediation with the consent of both parties, or
25 else one or both parties may elect to resort to court proceedings.
26 (Doc. No. 68 at 12:16-23.)

22 SDDPC's SAC does not allege it engaged in any dispute resolution efforts with respect to
23 its claim for breach of contract and \$6 million in remediation damages, let alone what is required
24 by Section 21 of the MSA. SDDPC's SAC does not allege that it escalated the dispute through
25 two different levels of management for each side for a period of 14 working days, or that the
26 dispute was referred "in writing for final settlement" to the President of Axon and the President
27 and CEO of SDDPC "for a period of (14) days from the date of the written reference."

28 SDDPC does not and cannot allege this occurred because the truth is that SDDPC and the

1 City elected to terminate Axon for convenience, so the only thing left to discuss after Axon's
 2 termination was the amounts that were owed to Axon for the work done up to the effective date of
 3 termination. This is exactly what Axon, SDDPC, and the City allege occurred. The only
 4 "differences" SDDPC and the City allege the parties were discussing after Axon's termination
 5 was Axon's claim to payment for unpaid deliverables and SDDPC's and the City's refusal to pay
 6 those amounts. While this is the basis for Axon's claims, these allegations do not support a claim
 7 by SDDPC (or the City) that it complied with dispute resolution provisions of the MSA as
 8 required to terminate the MSA for cause pursuant to Section 2.3.

9
 10 **V.**
CONCLUSION

11 Based on the foregoing reasons and authorities, Axon respectfully requests the Court grant
 12 Axon's Motion to Dismiss the SDDPC's Second Amended Counterclaim for Breach of Contract
 13 pursuant to Rule 12(b)(6).

14 Dated: November 29, 2010

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